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Nos. A-1010
A-1012

In the Supreme Court of the United States

October Term, 1981

BOSWELL, INC. dba BROADACRES,
Appellant,

vs.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

AND

BOSWELL, INC. dba RENO COUNTY ADULT CARE HOME,
Appellants,

vs.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Boswell, Inc., Appellant, appeals from the final judgments of the Supreme Court of Kansas, dated February 27, 1982, and prays that an order be entered noting probable jurisdiction of the appeals.

QUESTIONS PRESENTED

1. Do the provisions of the state statutes which grant and delegate to the Kansas Department of Health and Environment, an agency of the State of Kansas, in broad and general terms the power to license and regulate nursing homes in the state of Kansas offend and violate the due process and equal protection clauses of the 14th Amendment to the United States Constitution?

2. Do the provisions of the state statutes governing nursing home licensure and certification in the state of Kansas and the regulations adopted thereunder permit an arbitrary and discriminatory granting or denial of a nursing home license and certification in violation of due process and equal protection afforded under the provisions of the 14th Amendment to the United States Constitution?

3. Are state statutes and regulations governing the granting and denial of licenses to nursing homes subject to the due process requirement of the 14th Amendment to the United States Constitution precluding vagueness and indefiniteness?

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the Supreme Court of Kansas, which appears in the appendix hereto, pp. A1-A19, is reported at 230 Kan. 738, ... P. 2d ....., and 230 Kan. 611, ... P. 2d .....

The decisions and judgments of the trial court, District Court of Reno County, Kansas is not reported, but appears in the appendix hereto, pp. A20-A25.

JURISDICTION

The judgments of the Supreme Court of Kansas, entered on the 27th day of February, 1982, upheld the order of denial of licensure and certification to Appellant's nursing home facility by a state administrative agency under an attack by Appellant that the statutory scheme and regulations relied upon bv the administrative agency for its order of denial was unconstitutional and deprived Appellant of due process and equal protection of the law afforded by reason of the 5th and 14th Amendments to the United States Constitution.

The Notice of Appeal was filed in the Supreme Court of Kansas on May 26, 1982, and an order extending Appellant's time to docket this appeal to June 28, 1982 was granted by the Hcnorable Justice Byron R. White on May 25, 1982.

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(2), this being an appeal which draws into question the validity of state statutes and regulations as being repugnant to the Constitution of the United States.

In the event that the court does not consider appeal the proper mode of review, Appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 U.S.C. Sec. 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the 14th Amendment of the Constitution of the United States provides as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 39-926, cited as K.S.A. 39-926, of the Kansas Statutes Annotated, provides:

> "It shall be unlawful for any person or persons acting jointly or severally to operate an adult care home within this state except upon license first had and obtained for that purpose from the secretary of health and environment as the licensing agency upon application made therefor as provided in this act, and compliance with the requirements, standards, rules and regulations, promulgated under its provisions."

Section 39-931, cited as K.S.A. 39-931, of the Kansas Statutes Annotated, provides:

> "Whenever the licensing agency finds a substantial failure to comply with the requirements, standards, or rules and regulations established under this act or that a receiver has been appointed under K.S.A. 39-958, it shall make an order denying, suspending,

or revoking the license, and said order shall set forth the particular reasons for the action taken. Such order shall be served upon the licensee or the applicant by personal service or by certified mail, return receipt requested. Unless appealed from as hereinafter provided, said order shall become final and effective twenty (20) days from the date of its issuance.

Any applicant or licensee who is aggrieved by said order may appeal within twenty (20) days after its issuance by filing with the licensing agency a written notice of appeal and said notice shall specify wherein said order is unreasonable, unjust, or illegal. Upon receipt of such notice it shall be the duty of the licensing agency to fix a date for hearing which shall not be later than fifteen (15) days after the date of receipt of the notice of appeal. The licensing agency shall prescribe by rule and regulation the procedure for hearing all appeals and may designate a member or members of the staff of the licensing agency as an appeals referee or committee who shall have authority to subpoena witnesses, and administer oaths, take testimony, and render decisions. On the basis of any such hearing or upon default of the applicant or licensee the appeals referee or committee shall make a determination specifying its findings of fact and, where indicated, conclusion of law.

A copy of such determination shall be sent by certified mail, return receipt requested, or served personally upon the applicant or licensee. Pending the appeal a license previously issued shall remain in force. In case the decision at the hearing sustains the decision of the licensing agency in denying, suspending, or revoking the license, the applicant or licensee shall be given fifteen (15) days after the decision is mailed

or served to comply with the decision made at the appeal hearing. Nothing herein shall be construed to prevent the licensing agency from commencing immediately an action for injunction or other process to restrain or prevent the operation of any licensed home which the licensing agency, upon investigation, shall have found to be operated or maintained in such a manner as to constitute a clear and immediate threat to the lives or health of its residents. Any such action shall be brought in the district court in the county in which the home is located, and shall be filed by the county attorney or district attorney of such county or the attorney general. Any applicant or licensee aggrieved by the order of the licensing agency in denying, suspending, or revoking a license may appeal therefrom by filing a petition specifying the action of the licensing agency appealed from, in the district court of the county in which the applicant or licensee resides, within fifteen (15) days after receipt of a copy of the order of the licensing agency, and said court shall have jurisdiction to affirm, reverse, modify, or vacate the order complained of if the court is of the opinion that the order was arbitrary, unlawful, or unreasonable.

Within seven (7) days after the petition has been filed in the district court, notice of the appeal shall be given to the licensing agency by mailing certified copies of the petition, by certified mail. Upon receipt of such notice, the licensing agency shall forthwith make available, for examination and inspection, to the applicant and the applicant's attorney all its records pertaining to such matter. From the judgment of the district court, appeal may be taken as in other civil actions. An appeal to the district court or an

appellate court shall not operate to stay the effect of an order of the licensing agency, unless the judge or the court shall specifically allow such a stay."

Section 39-932, cited as K.S.A. 39-932, of the Kansas Statutes Annotated, provides:

"The licensing agency shall adopt, amend, promulgate and enforce such rules, regulations and standards as may be deemed practicable, reasonable and necessary with respect to all adult care homes, to be licensed hereunder and as may be designed to further the accomplishment of the purpose of this law in promoting safe, proper and adequate treatment and care of individuals in adult care homes in the interest of public health, safety and welfare. Such rules and regulations may prescribe minimum standards and requirements relating to the location, building, construction, size, equipment and facilities of adult care homes, the number and kind of residents allowed, the types of care offered, the records to be kept, the kind and frequency of reports and inventories to be made, and may generally establish such requirements as may be deemed necessary to protect the health, safety, hygiene, welfare and comfort of the residents.

Adult care homes which are in operation at the time of promulgation of any applicable rules and regulations or minimum standards under this act shall be given a reasonable time, under the particular circumstances not to exceed twelve (12) months from the date of such promulgation within which to comply with such rules and regulations and minimum standards. The licensing agency may further establish by regulation a system whereby it may, on the basis of the investigations and evaluations herein provided

for, uniformly rate adult care homes in terms of the quality and quantity of services and facilities provided."

Sections K.A.R. 28-39-30 through 28-39-50, referred to as Kansas Administrative Regulations, adopted under the authority of K.S.A. 39-932, referred to above.

Section 42 U.S.C.A. Sec. 1396 et seq.

Section 42 C.F.R. Sec. 442.250 et seq.

STATEMENT OF CASE

Appellant is a family corporation, formed by Frank and Mary Boswell, husband and wife, in 1969 to operate nursing homes in the state of Kansas.

Mary and Frank Boswell assumed the operation of an old county-run nursing home sometime in 1968, by leasing the premises from the county of Reno. The home had been operated by the county to house elderly welfare recipients and the Boswells continued to provide for the care of such patients upon the transition to them.

In 1970, the county built another facility adjacent to the existing facility, to accommodate the expanding need, and leased it to the Boswells. From that date, the Boswells, through their family corporation, operated both facilities under lease from the county.

The two facilities, or nursing homes, operated under separate licenses from the state, and later separate medicaid certification, even though the facilities were within feet of each other. For operational and licensure purposes, the two homes were designated as "Broadacres" and the "Reno County Adult Care Facility".

Licenses and certification for the facilities were granted and renewed each year, and from the time period of 1968 through 1979 the facilities experienced no difficulty with licensing and certification. As is the case with every other nursing home in the state, some violations, or deficiencies, were found or noted on the annual survey, but a plan of correction was submitted to the licensing agency and the license was renewed and certification granted.

In the absence any unusual event, or a history of poor case or harm to a patient over the span of roughly ten years, to explain or justify the coming event, both of the facilities, simultaneously, began to experience difficulty with licensure and certification in 1979. While the "Broadacres" facility was being operated in a much older building than the Reno County Adult Care Facility, the latter being built in 1970, both facilities lost their licenses together, raising the inference that the Boswells were the target rather than the operations.

Contrary to the pattern established over the previous years of operation, the facilities' plan of correction for minor deficiencies were rejected, and upon follow-up surveys new deficiencies would be cited in areas inspected and passed a few months, or weeks earlier. In the interim period, no changes would have occurred in these areas, or the operation of the facility, or regulations to justify the new deficiencies. And when the new deficiencies would be addressed by the facilities, others would be cited, until finally the homes were ordered closed with less noted deficiencies than existed in the past when the homes were licensed and certified. Simultaneous with the closing of Appellant's facilities, the licensing agency was granting licenses and certification to other nursing homes in the state, as demonstrated by the agency's public records, with existing deficiencies far in excess, both quali-

tatively and quantitatively, of those shown for Appellant's homes. Additionally, the history of some of the homes licensed, as shown by the public record, were poor, comparatively speaking.

Eventually, the Kansas Department of Health and Environment, the state agency that grants and denies licenses to nursing homes in the state of Kansas, denied licenses to the homes in January of 1980 and ordered both homes closed. Appeals were taken within the agency from the denial, and the agency later affirmed its earlier denial order on May 19, 1980 and August 25, 1980, respectively, for the Reno County Adult Care Facility and Broadacres.

Timely appeals were taken from the administrative orders to the District Court of Reno County, Kansas, which affirmed the orders denying licensure and certification to the facilities. The judgment of the District Court was made upon the record of the administrative agency, and the court reviewed the agency's order under the limited standard of the state statute, K.S.A. 39-931, whether the order was arbitrary, unlawful, or unreasonable.

The District Court did not address the constitutional, or federal questions presented by Appellant. Appellant appealed to the Supreme Court of Kansas from the District Court decision, and after the submission of briefs and oral arguments, the District Court was affirmed.

As with the trial court, Appellant asserted and questioned the validity of the state statutes and regulations governing licensure under the due process and equal protection clause of the 14th Amendment to the United States Constitution in the state Supreme Court. In both brief and oral argument, Appellant asserted that the licensure statutes and regulations violate rights of due process and

equal protection afforded by reason of the 14th Amendment to the United States Constitution. The Supreme Court of the State of Kansas rejected those arguments by its silence, except for the passing comment that:

> ". . . (A)mendments which provide for the licensure of adult care homes, do not constitute an unlawful delegation of legislative authority and are not constitutionally impermissible as being vague and indefinite."

and affirmed the denial of licenses and certification to the facilities under the limited standard that the agency order was not arbitrary, unlawful, or unreasonable.

THE QUESTIONS ARE SUBSTANTIAL

The court below limited its analysis to whether the order denying a license and certification to Appellant's nursing homes was arbitrary, fraudulent, or unlawful, and gave only passing consideration to the substantial federal questions.

The important federal questions relating to whether the statutory scheme governing licensure of nursing homes in the state of Kansas violated due process and equal protection of the laws afforded by reason of the 14th Amendment to the United States Constitution received virtually no attention in the court's analysis and decision in upholding the constitutionality of the statutes and regulations under attack by Appellant.

It would have been proper, as it will be for this court, for the court below to have addressed the federal questions upon the contentions of Appellant, even though the proceedings concern administrative orders, inasmuch as the actions of the administrative agency affected liberty and property interests protected by the 14th Amendment

to the United States Constitution. The granting and denying of licenses have long been recognized as involving liberty and property interests protected by the 14th Amendment. *Mackey v. Montrym*, 443 U.S. 1, 61 L.Ed. 321, 99 S.Ct. 2612 (1979); *Dixon v. Love*, 431 U.S. 105, 52 L.Ed. 2d 172, 97 S.Ct. 1723 (1977).

As with most businesses and occupations requiring licenses to operate, the only lawful way to operate a nursing home in the state of Kansas is by acquiring and maintaining a license from the state. The liberty and property interests are substantial, particularly in view of the fact, as with the Boswells, the homes are operated as the only means of a livelihood and as an occupation.

The court below properly recognized that an administrative agency may be delegated rule-making and adjudicatory functions, but did not consider whether the statutory scheme governing the licensing of the nursing homes of Appellant clothed the agency with arbitrary power in its delegation, which would permit arbitrary and discriminatory denial of licenses in violation of due process and equal protection.

It is said at 1 AmJur 2d, *Administrative Law*, Sec. 147:

> "It is almost universally held that arbitrary powers may not be conferred upon administrative agencies either in the exercise of rulemaking or adjudicatory functions, and that in order to avoid a delegation of legislative power, a violation of due process of law, or denial of equal protection of the laws, the legislature in conferring determinative or adjudicatory powers, as well as in conferring rulemaking powers, generally cannot leave the determinatioon to the uncontrolled discretion of the administrative agency but must declare a policy and fix a primary standard or limit to control the discretion of the agency."

Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 20, 6 S.Ct. 1064, represents an earlier, yet viable expression, that statutes and regulations, though appearing fair and impartial on their face, if permitting of an unequal application, offend the 14th Amendment to the United States Constitution.

The statutory scheme in question confers upon the administrative agency the power to grant, deny and revoke licenses for nursing homes, but does not confine and restrict the power granted, except to say, in essence, that the agency may deny a license to a nursing home if the agency should find that the home has failed to substantially comply with the rules and regulations promulgated by the agency. It is left up to the agency to define substantial compliance. This has permitted the licensing agency, in licensing nursing homes in the state, as demonstrated for the record, to grant and deny licenses in an arbitrary and oppressive fashion.

The due process and equal protection implications are compounded by the adoption of vague and broad regulations by the agency under its rule-making power which the nursing homes must substantially comply with to be licensed. It has long been recognized by this court that the due process clause forbids vague statutes, and this court has applied the same restrictions to regulations which govern economic or commercial activities, if a violation can engender penalties, such as a denial of a license, *Lemberos v. Laurel Racecourse, Inc.*, 489 F. Supp. 1376 (1980).

This court noted in *Graymed v. City of Rockford*, 408 U.S. 104, 33 L.Ed. 2d 22, 92 S.Ct. 2294 (1972) that:

> "Vague laws offend several important values: first, vague laws may trap the innocent by not providing fair warning; second, vague law impermissibly

delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application; and third, where a vague statute abuts on sensitive areas of basic first amendment freedoms, it operates to inhibit the exercise of those freedoms."

See also *Michini v. Rizzo*, 379 F. Supp. 837, 849 (1974).

Several state courts have struck down nursing home statutes and regulations similar to the ones enforced against Appellant as offending the 14th Amendment rights of due process and equal protection against vagueness and discrimination. *Highridge Management Corp. v. State*, 354 So. 2d 377; *Holbl v. Whalen*, 406 N.Y.S. 2d 621; *Levin v. Whalen*, 378 N.Y.S. 2d 800.

The vagueness of the regulations applied by the licensing agency herein, coupled with the lack of an explicit standard to control the granting and denying of licenses and certification, enabled the agency to arbitrarily and discriminatorily enforce the rules against Appellant and others who may fall out of favor with the agency or members of the agency, and when a nursing home, such as Appellant's, finds itself in that position, it is unable to defend against the deprivation of substantial liberty and property interests, for the lack of definitive standards and guidelines permits the agency to place interpretations on its regulations which serves the agency's position at the moment. The limited and restricted analysis of the court below did not adequately address the substantial federal questions raised by the existing statutes and regulations applied to deprive Appellant of substantial liberty and property interests.

CONCLUSION

For these reasons, this court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

No. 53,379

BOSWELL, INC., d/b/a BROADACRES,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee.

SYLLABUS BY THE COURT

1. The scope of court review contemplated by K.S.A. 39-931 (Ensley) of an order of the Department of Health and Environment refusing to issue a license to an adult care home is limited to determining whether the order was arbitrary, unlawful, or unreasonable. On appeal a court is restricted to considering whether as a matter of law (1) the administrative tribunal acted fraudulently, arbitrarily, or capriciously, (2) the administrative order is supported by substantial evidence, and (3) the tribunal's action was within the scope of the authority of the administrative tribunal.

2. K.S.A. 39-923, *et seq.* (Ensley), and amendments which provide for the licensure of adult care homes, do not constitute an unlawful delegation of legislative authority and are not constitutionally impermissible as being vague and indefinite.

3. The record of administrative action in denying licensure and certification of an adult care facility as an intermediate nursing care home is examined on appeal, and it is *held*, the administrative tribunal acted properly, its denial of licensure and registration is supported by sub-

stantial competent evidence, and its order of denial was within the scope of its authority.

Appeal from Reno district court, PORTER K. BROWN, judge. Opinion filed February 27, 1982. Affirmed.

Robert L. Taylor, of Hutchinson, argued the cause and was on the brief for the appellant.

Emily E. Cameron, of Kansas Department of Health and Environment, argued the cause and was on the brief for the appellee.

The opinion of the court was delivered by

FROMME, J.: This is an administrative appeal authorized by K.S.A. 39-931 (Ensley). The appeal is from an order of the Department of Health and Environment denying licensure and certification as an intermediate nursing care home to Boswell, Inc., d/b/a Broadacres. This facility was located in Reno County near the city of Hutchinson, Kansas. The building was rented from the county by Mary and Frank Boswell in 1969, and a family corporation, Boswell, Inc., was organized to operate this and one other nursing home. This appeal only concerns the facility referred to as Broadacres. Broadacres was operated until it was ordered closed January 1, 1980. Most of the seventeen persons who occupied the facility at the time of the closing were recipients of federal benefits in the medicaid program. A state licensed adult care home has to meet the federal certification standards to participate in the medicaid program.

A yearly survey of all nursing homes in Kansas is made by the Kansas Department of Health and Environment. As a result of the survey of Broadacres made at the end of September, 1978, the facility was found not to be in substantial compliance with the rules and regulations

set by the department to govern intermediate nursing care homes. License renewal was denied in October, 1978. Later, on October 13, 1978, a second survey was completed to determine if federal certification requirements could be met. The facility did not meet the federal requirements and recertification was denied. The Boswells were notified that the deficiency findings could be discussed in conference with the department on November 2, 1978. They did not confer. The denial of the order refusing to renew the license was appealed. The appeal was heard by a hearing officer and the order revoking the license was affirmed. During this period a third survey and inspection for licensure was carried out. This was during the middle of July, 1979. Again the facility was found in substantial noncompliance with nursing home requirements.

Thereafter the Boswells gave up on the appeal of the revocation proceedings. Instead of appealing the revocation proceedings to the courts, they filed a new application for licensure and certification with the department. The premises were surveyed and inspected a fourth time by the department. This was about the middle of November, 1979. The facility was not in compliance with state and federal requirements and the application was denied.

This latter order denying the new application was appealed and it is the order presently on appeal before this court. The Reno County District Court examined the 911 page transcript of proceedings, including various exhibits, and affirmed the order denying licensure and certification which was issued by the Secretary of the Department of Health and Environment. This court in turn has examined this transcript, the exhibits and the briefs of the parties and will consider the contentions of the appellant.

The appellant first argues for a full de novo review of the proceedings by this court. This is a review of an administrative order denying licensure and certification. The scope of review contemplated by 39-931 is stated:

> "Any applicant or licensee aggrieved by the order of the licensing agency in denying, suspending, or revoking a license may appeal therefrom by filing a petition specifying the action of the licensing agency appealed from, in the district court of the county in which the applicant or licensee resides, within fifteen (15) days after receipt of a copy of the order of the licensing agency, and said court shall have jurisdiction to affirm, reverse, modify, or vacate the order complained of *if the court is of the opinion that the order was arbitrary, unlawful, or unreasonable.*
>
> ". . . From the judgment of the district court, appeal may be taken as in other civil actions. An appeal to the district court or an appellate court shall not operate to stay the effect of an order of the licensing agency, unless the judge or the court shall specifically allow such a stay." Emphasis supplied.

The scope of court review contemplated by 39-931 of an order of the Department of Health and Environment refusing to issue a license to an adult care home is limited to determining whether the order was arbitrary, unlawful, or unreasonable. On appeal a court is restricted to considering whether as a matter of law (1) the administrative tribunal acted fraudulently, arbitrarily, or capriciously, (2) the administrative order is supported by substantial evidence, and (3) the tribunal's action was within the scope of the authority of the administrative tribunal. See *Kansas State Board of Healing Arts v. Foote*, 200 Kan. 447, 450, 436 P.2d 828, 28 A.L.R.3d 472 (1968); *Olathe Hospital Foundation, Inc. v. Extendicare, Inc.*, 217 Kan.

546, 539 P.2d 1 (1975); *Kansas Dept. of Health & Environment v. Banks*, 230 Kan. 169, Syl. ¶ 1, 630 P.2d 1131 (1981).

Appellant next contends the statute and regulations adopted by the Department of Health and Environment with regard to the licensing of adult care homes constitute an unlawful delegation of legislative authority and are constitutionally impermissible as being vague and indefinite.

The legislature may enact general provisions for regulation and grant to *state agencies* certain discretion in filling in the details, provided it fixes reasonable and definite standards to govern the exercise of such authority. *Gumbhir v. Kansas State Board of Pharmacy*, 228 Kan. 579, 584, 618 P.2d 837 (1980).

Appellant fails to consider the law and the regulations in their entirety. K.S.A. 39-923 (*a*) (3) (Ensley) fully defines an intermediate nursing care home. The purpose of the act is clearly stated in 39-924. The requirements governing issuance of a license, covering inspections and investigations, providing for renewability, nontransferability, display and contents of the license are set forth in the provisions of the statute which follow in the other sections of the act. The Department of Health and Environment as the licensing agency is specifically authorized by 39-926 to establish necessary standards, rules and regulations for the operation and licensure of these facilities.

In addition thereto the rules and regulations of the Department of Health and Environment relating to the adult care homes were adopted in accordance with K.S.A. 1981 Supp. 77-420 and 77-421, which require approval by the secretary of administration and the attorney general,

plus public hearings after notice. Then under 1981 Supp. 77-426, provision is made for examination, modification or rejection of these regulations by the legislature. Thus the regulations are indirectly regulations which have been approved and adopted by the legislature.

Appellants also claim that the law and regulations are vague and indefinite. The few phrases or words specifically pointed to by appellant have well understood common meanings and are neither vague nor indefinite.

K.S.A. 39-923, *et seq.* (Ensley), and amendments which provide for the licensure of adult care homes, do not constitute an unlawful delegation of legislative authority and are not constitutionally impermissible as being vague and indefinite.

We turn next to the question of whether the order of the agency was supported by substantial competent evidence. The secretary approved the findings of the hearing officer. There were some thirty instances in which specific requirements for the health and safety of residents in the adult care home were found to have been violated. These violations need not be specifically tied to each respective regulation violated. Suffice it to say noncompliance was found in regard to the regulations beginning with K.A.R. 28-39-31 and continuing through K.A.R. 28-39-44. After examining the transcript we have no hesitation in saying the order denying licensure and certification was supported by substantial competent evidence in the following particulars:

Broadacres had neither an approved physical therapy room nor a physical therapy program. The facility had a single utility room in which dirty nonsterile bedding and clothing were kept next to clean bedding and clothing. The employees were not properly trained for their jobs.

Five of those working as nurses aides were not qualified as nurses aides. Personnel records on employees were not kept up to date. Records covering the admission and discharge of patients were not available in the files. A mental patient continued to be kept in the facility in direct violation of regulations applying to intermediate nursing care homes. The occupational therapist worked at this facility less than one hour a month, although her contract required two or three hours a month. There was no activity schedule or program for the residents in the home. There was no attempt to provide marked diet trays for residents needing special diets. Food supplies were inadequate at times and at other times too much food was cooked and later served as leftovers. The pharmaceuticals in the storage room were badly in need of organization and labeling. Narcotics were not properly kept under lock. Nonsterile supplies were kept in the room and the medicines were served in soiled cups. Staffing requirements for the facility were not met and there was no full time person in charge of medical records. There was no infection control committee headed by a designated doctor or nurse at the facility. There was no workable plan in force to deal with outbreaks of infectious diseases, such as influenza. There were no procedures set up for isolation of patients with infectious diseases.

In addition to the foregoing violations of specific regulations we find that K.S.A. 39-931a (*b*) (Ensley) provides that denial of licensure may be based on repeated violations or failure to correct previous violations. Many of the violations existed and continued through two or more inspections. As many as nine of those violations mentioned above were noted in at least four separate inspections, including the final one before the nursing home was closed.

Appellant's contention that they were not given an adequate opportunity to correct the deficiencies is clearly disproved by the record. A ninety day provisional license was issued at one time to permit the Boswells to correct these shortcomings. At the end of this period a major portion of the list of violations had not been corrected.

Appellant contends that federal certification was improperly denied because no violations of federal regulations were established. Under the federal regulations regarding certification of a facility for Title XIX medicaid patients, certification cannot be approved unless and until the facility is licensed by the state. 42 C.F.R. 442.251. In addition, the state regulations follow the federal regulations closely because many of these adult care homes are heavily dependent upon federal money from the medicaid program to meet their expenses. We have compared the federal regulations with the state regulations and substantial violations of the federal regulations are evident. It was proper for the department to hold this facility in substantial noncompliance with the federal regulations affecting federal certification under Title XIX for care of medicaid patients.

The order denying licensure and federal certification was not arbitrary, unlawful, or unreasonable. The judgment of the district court is affirmed.

No. 52,737

BOSWELL, INC., d/b/a RENO COUNTY ADULT CARE HOME,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee.

SYLLABUS BY THE COURT

1. Neither the district court nor the appellate court has the liberty to reweigh the evidence and substitute its judgment for that of the administrative agency.

2. K.S.A. 39-931 (Ensley) specifically limits the district court's authority to a determination whether the administrative order entered was arbitrary, unlawful, or unreasonable. The appellate court then, to determine whether the district court properly limited its scope of review, makes the same review of the administrative agency's action.

3. Ordinarily, an issue that has not been raised in the lower court cannot be raised for the first time on appeal.

4. In an appeal from a decision of the district court upholding an order of the Secretary of the Kansas Department of Health and Environment to deny licensure and certification to an intermediate nursing care home, the record is examined and it is *held*: (1) The action of the administrative agency was neither arbitrary, unlawful, nor unreasonable, and (2) the decision of the district court is upheld, all as more particularly related in the opinion.

Appeal from Reno district court; PORTER K. BROWN, judge. Opinion filed February 27, 1982. Affirmed.

Robert L. Taylor, of Hutchinson, argued the cause and was on the brief for the appellant.

Emily E. Cameron, of Kansas Department of Health and Environment, argued the cause and was on the brief for the appellee.

The opinion of the court was delivered by

SCHROEDER, C.J.: Boswell, Inc., d/b/a Reno County Adult Care Home, appeals from the district court decision which affirmed the order of the Secretary of the Kansas Department of Health & Environment (KDHE) denying the facility a license to operate an intermediate nursing care home and denying certification to receive payments under the federal medicaid program. Boswell, Inc., also runs a second adult care facility named Broadacres which is located adjacent to the Reno County Adult Care Home but which operates under a separate license and certification. The licensure and certification of Broadacres is also the subject of appeal before this court. *Boswell, Inc. v. Harkins, d/b/a Broadacres*, 230 Kan. , P.2d (1982) (No. 53,379, this day decided).

The KDHE conducts inspections or field surveys of adult care homes for purposes of state licensure pursuant to authority granted in K.S.A. 39-923 *et seq.* (All statutory references are to the Ensley editions of the Kansas Statutes Annotated.) The department also conducts field surveys under contract with the Kansas Department of Social & Rehabilitation Services for purposes of certifying that federal requirements for participation in the medicaid program, 42 U.S.C.A. § 1396 *et seq.*, have been met. Thus, KDHE field surveys often serve a dual purpose, depending on whether the nursing home has chosen to participate in

the federal medicaid program. In the case at bar, the nursing home had chosen to participate in the federal program, and the two surveys were conducted simultaneously.

Although this appeal involves only the October 24, 1979, application for license and certification by the Reno County Adult Care Home, it is helpful to an understanding of the administrative agency and district court decisions in this case to begin our review of the facts at an earlier point in time. While it is not necessary to this appeal to detail the history of the facility since its inception in 1970, it is important to note that the facility was granted a provisional rather than a full license in November 1978 because of numerous deficiencies. That provisional license expired in March 1979 at which time surveyors from the KDHE made a reinspection. On the basis of their report, the Secretary denied a license application and stated no new provisional license would be issued. Appeal was taken within the administrative agency, but no appeal was taken to the district court from the adverse agency rulings. Instead, on October 24, 1979, the facility submitted a new application for license and certification. On November 15, 1979, the surveyors returned to the facility and filed a reinspection report with the Secretary, citing a number of deficiencies which are set out in greater detail later in this opinion. Based on this report, the Secretary issued an order on January 15, 1980, denying licensure and certification. The facility appealed and extensive testimony was heard by a hearing officer who subsequently filed findings of fact and conclusions of law and recommended the application for license and certification be denied. On May 19, 1980, the Secretary entered an order approving the hearing officer's report and affirming his previous order denying licensure and certification. On May 28, 1980, the facility appealed to the district court pursuant to K.S.A. 39-931

for determination whether the order was arbitrary, unlawful, or unreasonable. The district court found the Secretary's recommendation of denial of certification to the Department of Social & Rehabilitation Services was not unlawful and further found the order issued (1) was not fraudulent, arbitrary, or capricious, (2) was substantially supported by the evidence, and (3) was within the scope of the Secretary's authority. The district court affirmed the order denying both licensure and certification.

The facility duly filed its notice of appeal in the Court of Appeals, and the case was transferred to the Supreme Court on the court's own motion pursuant to K.S.A. 20-3018(c).

The appellant first argues that because the district court received no additional evidence the appellate court occupies the same position as the district court and can evaluate and weigh evidence in deciding the issues presented. We think the appellant has misconstrued the function of this court as well as that of the district court on review of an order by an administrative agency. Neither court has the liberty to reweigh the evidence and substitute its judgment for that of the administrative agency. *Kansas Dept. of Health & Environment v. Banks*, 230 Kan. 169, 171, 630 P.2d 1131 (1981); *Park South Apts. v. Dibbern*, 228 Kan. 784, 789, 620 P.2d 827 (1980); *Kansas State Board of Healing Arts v. Acker*, 228 Kan. 145, 153, 612 P.2d 610 (1980); *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. 780, 783, 473 P.2d 72 (1970); *Kansas State Board of Healing Arts v. Foote*, 200 Kan. 447, 450, 436 P.2d 828 (1968). Hearings on appeal are "not the equivalent of the initial hearing before the licensing agency which has the responsibility of weighing controverted evidence and arriving at an independent judgment, on the merits, as to entitlement to a license." *Rydd*

v. State Board of Health, 202 Kan. 721, 729, 451 P.2d 239 (1969).

In the case at bar, K.S.A. 39-931 specifically limits the district court's authority to a determination whether the order entered was arbitrary, unlawful, or unreasonable. The appellate court then, to determine whether the district court properly limited its scope of review, makes the same review of the administrative agency's action. *Kansas Dept. of Health & Environment v. Banks*, 230 Kan. at 172; *Park South Apts. v. Dibbern*, 228 Kan. at 789; *U.S.D. No. 461 v. Dice*, 228 Kan. 40, 49, 612 P.2d 1203 (1980); *Gillett v. U.S.D. No. 276*, 227 Kan. 71, 79, 605 P.2d 105 (1980); *Kansas State Board of Healing Arts v. Foote*, 200 Kan. at 451. To this limited extent, it may be said the appellate court occupies the same position as the district court; however, the review by each is limited in the statutorily prescribed manner.

Two considerations, one constitutional and the other a matter of conservation of resources, underlie endorsement of this limited scope of review. On a constitutional level, a broader scope of review would result in judicial usurpation of power delegated by the legislature to the administrative agency and contravention of the separation of powers doctrine. See *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. at 783; *Kansas State Board of Healing Arts v. Foote*, 200 Kan. at 450. Beyond the constitutional consideration, broader review would dilute the advantage of fact-finding by a specialized agency and cast the burden on a district judge who may have no expertise in the particular area. See *Foote*, 200 Kan. at 450-51, 459.

The appellant next raises issues of (1) unlawful delegation of legislative power by both the state legislature and the United States Congress and (2) denial of due

process because duties imposed both as to licensure and certification are not set forth in terms definite enough to serve as a guide to those who have the duty imposed on them. An examination of the petition and brief submitted to the district court reveals these issues were not raised before the district court and consequently are not properly before this court. Ordinarily, an issue cannot be raised for the first time on appeal. See, *e.g.*, *City of Salina v. Jaggers*, 228 Kan. 155, 170, 612 P.2d 618 (1980); *Fleming v. Etherington*, 227 Kan. 795, 802, 610 P.2d 592 (1980); *Malone v. University of Kansas Medical Center*, 220 Kan. 371, 373-74, 552 P.2d 885 (1976); *State v. Estes*, 216 Kan. 382, 385, 532 P.2d 1283 (1975); *Pierce v. Board of County Commissioners*, 200 Kan. 74, 434 P.2d 858 (1967).

As its fourth point, the appellant contends the denial of licensure and certification to the Reno County Adult Care Home was arbitrary, unlawful, and/or unreasonable. Several arguments are advanced to support that contention.

A continuing theme in the transcripts and briefs is that the state has shown no incidents of actual harm to residents. Nowhere in the act do we find a requirement of actual harm. On the contrary, special provision is made for the prevention of harm to residents. After detailing an orderly process for administrative review of a license denial, suspension, or revocation, K.S.A. 39-931 provides:

> "Nothing herein shall be construed to prevent the licensing agency from commencing immediately an action for injunction or other process to restrain or prevent the operation of any licensed home which the licensing agency, upon investigation, shall have found to be operated or maintained in such a manner as to constitute a clear and immediate threat to the lives or health of its residents."

We find it neither arbitrary nor unreasonable to deny or revoke a license before *actual* harm to the residents of a home is demonstrated.

Appellant next argues that it is customary to have some deficiencies and that other facilities have been granted successive provisional licenses in violation of K.S.A. 39-929, which provides in part:

> "A provisional license may be issued to any adult care home, the facilities of which are temporarily unable to conform to *all* the standards, requirements, rules and regulations established under the provisions of this act. . . . A provisional license may be issued to provide time to make necessary corrections for not more than six (6) months. One additional successive six-month provisional license may be granted at the discretion of the licensing agency." (Emphasis added.)

The act recognizes that deficiencies may occur but contemplates that a facility will not operate on a provisional license for more than one year at a time. The provisions of the act apply equally to all nursing home facilities in the state. Assuming, for purposes of this argument only, that the KDHE has erroneously granted provisional licenses in the past, such erroneous action would not prevent enforcement of the statute in this action, *Warburton v. Warkentin*, 185 Kan. 468, 477, 345 P.2d 992 (1959), and would not constitute a denial of equal protection of the law. Past agency error does not abrogate enforcement of the law.

The facility next argues it has corrected deficiencies in the past. The implication seems to be that greater opportunity should be afforded to correct the deficiencies in this instance. We note that, for the six months preceding the application made in October 1979, the facility

was operating on a provisional license the purpose of which was to provide a grace period in which to correct deficiencies. Yet, the hearing officer who filed his report May 7, 1980, found evidence to support numerous violations reported in the November 15, 1979, field survey and found repeated violations of five regulations. K.S.A. 39-931a(b) provides in pertinent part:

> "Pursuant to K.S.A. 39-931, the licensing agency may deny a license to any person and may suspend or revoke the license of any person who: (1) Has willfully or repeatedly violated any provision of law or rules and regulations adopted pursuant to article 9 of chapter 39 of the Kansas Statutes Annotated."

The act clearly does not countenance violations nor envision perpetual grace periods in which to correct them.

Finally, appellant argues the action of the agency was arbitrary essentially because the denial has no reasonable relation to the lawful purpose of the act. An examination of the purpose statement of the act as well as those violations upheld by the hearing officer and the district court should determine the question. On appeal, the facility does not raise an issue challenging the existence of substantial evidence to support the violations.

K.S.A. 39-924 states the purpose of the act as follows:

> "The purpose of this act is the development, establishment, and enforcement of standards (1) for the care, treatment, health, safety, welfare and comfort of individuals in adult care homes licensed by the secretary of health and environment and (2) for the construction, general hygiene, maintenance and operation of said adult care homes, which, in the light of advancing knowledge, will promote safe and adequate accommodation, care and treatment of such individuals in adult care homes."

The hearing officer found and the district court affirmed as substantially supported by the evidence the following violations of K.A.R. 28-39-30 through 28-39-50 adopted pursuant to authority granted in K.S.A. 39-932:

K.A.R. 28-39-33 (A) Policies and procedures need to be revised to fit this facility, and procedures are needed to govern all areas and functions.

K.A.R. 28-39-33 (A) Administrator needs to maintain communication with nursing staff and other departments in regard to new admissions so person is on duty to process admission material when new residents are admitted.

K.A.R. 28-39-33 (J) Policies state that a resident can be discharged for complaining in the facility.

K.A.R. 28-39-33 (K) Committee has reviewed but has not revised policies to fit this facility.

K.A.R. 28-39-34 (B) The total care plan is not a useful tool in management of care. All goals need to be measurable.

K.A.R. 28-39-36 (A) No rehabilitation plan of care is available.

K.A.R. 28-39-38 (A) The activity program needs to be expanded to meet the needs of independent and group activities for each resident.

K.A.R. 28-39-38 (C) Recreation equipment appropriate for residents needs to be obtained.

K.A.R. 28-39-40 (D) Documentation of nurse aide certification is not kept on file for each employee.

K.A.R. 28-39-41 (D) (8) and (19) Hot food (eggs) was served at 112 degrees Farenheit rather

than 140 degrees. Tray identification system was inadequate.

K.A.R. 28-39-41 (F) Final rinse temperature on dishwashing machine is 160 degrees Farenheit rather than 170 degrees as specified by the manufacturer.

K.A.R. 28-39-42 (B) All legend drugs need to be under prescription.

K.A.R. 28-39-42 (E) Drug room needs to be kept free of all personal care items as well as items, clean and soiled, that need to be stored in the utility room. Emergency kit needs to be sealed and dated. Policies and procedures for emergency drugs need to be followed. Policies on self-administration of drugs need to be clarified.

K.A.R. 28-39-43 (A) Closed records need to be organized according to policies and procedures.

K.A.R. 28-39-43 (B) Two of records checked lacked past medical history.

K.A.R. 28-39-43 (D) There is no full-time employee responsible for medical records.

K.A.R. 28-39-44 (A) Policies and procedures for investigating, controlling, and preventing infections are not appropriate for this facility.

K.A.R. 28-39-45 (B) Although an effort was made by the facility to conduct more fire drills after the November 15, 1979, survey, at the time of the survey there was a deficiency.

K.A.R. 28-39-46 (L) The laundry facility does not provide functional separation of clean and soiled linens.

K.A.R. 28-39-48 (I) There was no sign on the toilets for the handicapped.

The violations cited reasonably relate to purposes stated in the act, and denial of a license for these violations could not be termed arbitrary. It would serve no useful purpose to set out in detail the specific violations of 42 C.F.R. § 442.250 *et seq.*, as they relate to certification under the medicaid program. Suffice it to say, they are detailed and keyed to the appropriate sections of the federal regulations.

Review of the record as a whole supports the district court's determination that the order of the Secretary was neither arbitrary, unlawful, nor unreasonable.

Appellant's fifth point on appeal is that, under any reasonable interpretation of K.S.A. 39-931, the facility has "substantially complied" with the requirements, standards, rules, and regulations. Whether there has been substantial compliance depends on whether the purposes of the statute have been met. Although some of the violations set out above could never support a denial of licensure standing on their own, taken as a whole the violations do establish a substantial failure to comply with the regulations requiring policies and procedures to prepare the staff for untoward events, such as disasters or infections, and to plan for the care and activities of the residents.

Finally, appellant contends the procedures followed by the KDHE in determining certification usurp federal law and defeat congressional intent concerning certification under the medicaid program. The record in this case reveals KDHE surveys for licensure and certification may be conducted simultaneously, but separate state and federal regulations are followed in citing violations. The contention is without merit.

The decision of the lower court is affirmed.

IN THE DISTRICT COURT OF RENO COUNTY, KANSAS

80 C 449

BOSWELL, INC., D/B/A BROADACRES,
Plaintiff,

vs.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Defendant.

MEMORANDUM OPINION

On October 25, 1979, the operators of Broadacres Adult Care Home of Hutchinson applied for a license to operate an intermediate care adult care home, and on October 31, 1979, applied for certification as meeting Medicaid Regulatory Requirements. On November 13 and 14, 1979, the facility was inspected for the purpose of licensure and certification by representatives of the State Department of Health and Environment. These representatives, or surveyors, made recommendations to the Secretary of Health and Environment, and on the 15th day of January, 1980, the Secretary issued an order denying the licensure and certification. The facility appealed, and on May 8, June 2, June 3, June 24 and June 25, 1980, the appeal was heard by Mr. John R. Martin, hearing officer. On July 11, 1980, Mr. Martin filed extensive findings of fact and conclusions of law and recommended that the order denying the application for licensure and for certification be affirmed. On July 18, 1980, Mr. Martin filed amended findings of fact and conclusions of law to correct a typographical error in his original filing of July 11. His recom-

mendation remained the same. On August 25, 1980, the Secretary of Health and Environment entered an order approving the hearing officer's amended report and affirming his previous order of denial of licensure and certification. On September 8, 1980, the facility appealed to this Court, pursuant to K.S.A. 39-931.

The record consists of a transcript of nine hundred and nine pages, a cassette tape and a large box of exhibits.

K.S.A. 39-931 states that I have jurisdiction to affirm, reverse, modify or vacate the order complained of if I am of the opinion that the order was arbitrary, unlawful or unreasonable.

The facility alleges in paragraph five of its notice of appeal that the denial of certification as a Medicaid recipient was done without authority and jurisdiction. The Kansas Administrative Regulations provide that the State Department of Social and Rehabilitation Services may terminate participation in the nursing home program of Medicaid in accordance with K.A.R. 39 [sic] -2-7 and 30-2-8. K.A.R. 30-2-8 provides that the provider's participation may be terminated for either noncompliance with state laws or regulations or for suspension or termination of license to conduct business in Kansas. Thus, the Department of Health and Environment would be authorized to recommend denial of certification based solely upon its denial of licensure. In addition, the hearing examiner found violations of thirteen federal regulations. The denial of certification is therefore, not without authority or jurisdiction.

Is the order of the Secretary denying licensure arbitrary, unlawful or unreasonable? The order is based upon findings by the hearing officer that the facility was in violation of at least sixteen specific regulations and

had repeatedly violated the law or rules and regulations adopted by the Secretary. In accordance with the standard of review set forth in Coggins v. Public Employees Relations Board, 2 K.A.2d 416, as modified by the specific provisions of K.S.A. 39-931, I find that the order of the Secretary denying licensure and certification to appellant, based upon a comparison of the record and the specific findings of fact and conclusions of law filed by the hearing examiner, is:

1. Not fraudulent, arbitrary or capricious;
2. Substantially supported by the evidence; and
3. Within the scope of his authority.

I, therefore, conclude that the order of the Secretary of Health and Environment denying licensure and certification to the Broadacres Adult Care Home should be affirmed.

JOURNAL ENTRY OF JUDGMENT

NOW on this 19th day of May, 1981, judgment is entered as follows:

The Order of the Secretary of Health and Environment denying licensure and certification to the Broadacres Adult Care Home is affirmed.

/s/ Porter K. Brown
Porter K. Brown
District Judge Division One
27th Judicial District of Kansas

(Filed October 28, 1980)

IN THE DISTRICT COURT OF RENO COUNTY, KANSAS

80 C 299

BOSWELL, INC., D/B/A RENO COUNTY ADULT CARE HOME,
Plaintiff,

vs.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Defendant.

MEMORANDUM OPINION

On October 24, 1979, the operators of the Reno County Adult Care Facility of Hutchinson applied for a license to operate an intermediate care adult care home and for certification as meeting Medicaid Regulatory Requirements. On November 15, 1979, the facility was inspected for the purpose of licensure and certification by representatives of the State Department of Health and Environment. These representatives, or surveyors, made recommendations to the Secretary of Health and Environment, and on January 15, 1980, the Secretary issued an order denying the licensure and certification. The facility appealed, and on March 10, 11, 12, 19 and 26, the appeal was heard by Arthur E. Palmer, hearing officer. On May 7, 1980, Mr. Palmer filed extensive findings of fact and conclusions of law, and recommended that the application of the Reno County Adult Care Facility for licensure and certification be denied. On May 19, 1980, the Secretary entered an order approving the hearing officer's report and affirming his previous order of denial of licensure and certification.

On May 28, 1980, the facility appealed to this Court, pursuant to K.S.A. 39-931.

The record consists of a transcript of seven hundred and forty-seven pages, a cassette tape and approximately fifty pounds of exhibits.

K.S.A. 39-931 states that I have jurisdiction to affirm, reverse, modify or vacate the order complained of if I am of the opinion that the order was arbitrary, unlawful or unreasonable.

The facility first complains that the order of the Secretary denying certification as a Medicaid recipient was done without jurisdiction. K.A.R. provides that the State Department of Social and Rehabilitation Services may terminate participation in the nursing home program of Medicaid in accordance with K.A.R. 39-2-7 and 30-2-8. K.A.R. 30-2-8 provides that the provider's participation may be terminated for either noncompliance with state laws or regulations or for suspension or termination of license to conduct business in Kansas. Thus, the Department of Health and Environment would be authorized to recommend denial of certification based solely upon its denial of licensure. The denial of certification is therefore, not unlawful.

Is the order of the Secretary arbitrary or unreasonable? The order is based upon findings by the hearing officer that the facility was in violation of fourteen specific regulations and had repeatedly violated five regulations. In accordance with the standard of review set forth in Coggins v. Public Employees Relations Board, 2 K.A.2d., 416 as modified by the specific provisions of K.S.A. 39-931, I find that the order of the Secretary, based upon a comparison of the record and the specific findings of fact and conclusions of law filed by the examiner, is:

1. Not fradulent, arbitrary or capricious;
2. Substantially supported by the evidence; and
3. Within the scope of its authority.

I, therefore, conclude that the order of the Secretary denying licensure and certification to the Reno County Adult Care Facility should be affirmed.

/s/ Porter K. Brown
Porter K. Brown
District Judge Division One
27th Judicial District of Kansas

JOURNAL ENTRY OF JUDGMENT

NOW on this 28th day of October, 1980, judgment is entered as follows:

The order of the Secretary of Health and Environment denying licensure and certification to the Reno County Adult Care Facility is affirmed.

/s/ Porter K. Brown
Porter K. Brown
District Judge Division One
27th Judicial District of Kansas

SUPREME COURT OF THE UNITED STATES

No. A-1012

BOSWELL, INC dba RENO COUNTY ADULT CARE HOME,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time within which to docket an appeal in the above-entitled case be, and the same is hereby, extended to and including June 28, 1982.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 25th day of May, 1982.

SUPREME COURT OF THE UNITED STATES

No. A-1010

BOSWELL, INC. dba BROADACRES,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time within which to docket an appeal in the above-entitled case be, and the same is hereby extended to and including June 28, 1982.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 25th day of May, 1982.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 53,379

BOSWELL, INC., d/b/a BROADACRES,
Appellant,

vs.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Boswell, Inc., d/b/a Broadacres, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Kansas, affirming the decision of the Reno County District Court, entered in this action on the 27th day of February, 1982.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

By /s/ Robert L. Taylor
Robert L. Taylor
Attorney for Appellant

CERTIFICATE OF SERVICE

Robert L. Taylor, Attorney for Appellant, states that he deposited a copy of the foregoing Notice of Appeal to the Supreme Court of the United States in the United States mail, postage prepaid, addressed to Ms. Emily Cameron, Attorney, Kansas Department of Health and Environment, Forbes Field, Topeka, Kansas 66620 on this 26th day of March, 1982.

By /s/ Robert L. Taylor
Robert L. Taylor
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 52,737

BOSWELL, INC., d/b/a RENO COUNTY ADULT CARE HOME,
Appellant,

vs.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Boswell, Inc., d/b/a Reno County Adult Care Home, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Kansas, affirming the decision of the Reno County District Court, entered in this action on the 27th day of February, 1982.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

By /s/ Robert L. Taylor
Robert L. Taylor
Attorney for Appellant

CERTIFICATE OF SERVICE

Robert L. Taylor, Attorney for Appellant, states that he deposited a copy of the foregoing Notice of Appeal to the Supreme Court of the United States in the United States mail, postage prepaid, addressed to Ms. Emily Cameron, Attorney, Kansas Department of Health and Environment, Forbes Field, Topeka, Kansas 66620 on this 26th day of March, 1982.

By /s/ Robert L. Taylor
Robert L. Taylor
Attorney for Appellant